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In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October 3, 1986

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QUESTION PRESENTED

May a federal court abstain from adjudicating a statutorily based federal preemption claim that presents a substantial federal question where there is no countervailing state interest and which claim is not the subject of a state judicial proceeding?

STATEMENT REQUIRED BY RULE 28.1

The parent company of petitioner, New Orleans Public Service Inc. ["PUBLIC SERVICE"], is Middle South Utilities, Inc. ["MSU"], a registered public utility holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§79-79z-6 (1986). PUBLIC SERVICE's affiliates or subsidiaries (except wholly owned subsidiaries) are Arkansas Power & Light Company ["AP&L"], Louisiana Power & Light Company ["LP&L"], Mississippi Power & Light Company ["MP&L"], System Energy Resources, Inc. (formerly Middle South Energy, Inc.), Middle South Services, Inc., Electec, Inc. and System Fuels, Inc.

PARTIES BELOW

Petitioner PUBLIC SERVICE was the plaintiff in the district court and the appellant in the Court of Appeals. The defendants-appellees were: The City of New Orleans ["CITY"], The Council of the City of New Orleans ["COUNCIL"], Messrs. Sidney J. Barthelemy, Joseph I. Giarrusso, Wayne M. Babovich, Lambert C. Boissiere, Jr., Michael Early, James Singleton and Bryan Wagner.

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IN THE
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OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, New Orleans Public Service Inc. ["PUBLIC SERVICE"], respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 2, 1986.

OPINIONS BELOW

The initial opinion of the Court of Appeals is reported at 782 F.2d 1236 (Randall, J.) and is reprinted in the appendix hereto, p. A-1. *infra.* The amending opinion of the Court of Appeals is reported at 798 F.2d 858 (Randall, J.) and the opinion of the District Court for the Eastern District of Louisiana (McNamara, J.) is unpublished. They are reprinted in the appendix hereto at pp. A-14 and A-35, *infra,* respectively. The Order denying the Motion of the Federal Energy Regulatory Commission ["FERC"] to Intervene to enable it to seek Rehearing En Banc is

unpublished. It is reprinted in the appendix hereto at p. A-33, *infra.*

JURISDICTION

Invoking federal jurisdiction under the Commerce Clause, the Supremacy Clause, the Preemption Doctrine, the Federal Power Act and 42 U.S.C.§ 1983, PUBLIC SERVICE brought this suit in the Eastern District of Louisiana. The Eastern District granted the defendants' Motion to Dismiss. See page A-35, *infra.*

ON PUBLIC SERVICE's appeal, the Fifth Circuit on February 14, 1986 entered a judgment and an opinion reversing the Eastern District's order and remanding the case to the Eastern District for a decision on the merits. See p. A-1, *infra.* Although no petition for rehearing was sought, issuance of the mandate was stayed.[1] The Fifth Circuit on September 2, 1986 entered a judgment and an opinion amending Part IV of its earlier opinion. See p. A-14, *infra.* This petition for certiorari was filed within 90 days of that date.

The jurisdiction of this Court to review the judgment entered by the Fifth Circuit on September 2, 1986 is invoked under 28 U.S.C. §1254(1).

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[1] Remarkably, the mandate was "held" by an instruction issued *ex proprio motu* by a member of the Court who was not on the panel. See p. A-30. No party requested that the mandate be stayed, nor did the Court advise the parties of this action. The stay was continued for more than six months. See p. A-30.

STATEMENT OF THE CASE

PUBLIC SERVICE provides retail electric service only within the City of New Orleans, Louisiana. PUBLIC SERVICE also engages in the production, transmission, wholesale interstate purchase and wholesale interstate sale of electric power.[2] The genesis of this case is an "Opinion and Order Setting Just, Reasonable and Non-Discriminatory Rates," 31 F.E.R.C. (CCH) ¶61,305 (June 13, 1985) ["FERC Opinion No. 234"], issued by the FERC allocating the electricity and costs from Grand Gulf Unit 1,[3] a 1250 megawatt, nuclear-fueled generating station located near Port Gibson, Mississippi, in such a way as to equalize the cost of the Middle South System's investment in nuclear-fueled generating stations among the members of the Middle South System, AP&L, LP&L, MP&L and PUBLIC SERVICE, and their customers in four states, concluding that this resulted in "just, reasonable and non-discriminatory rates." *Id.* at 61,633, 61,654-55. The COUNCIL and the CITY participated vigorously and at great length in those proceedings, but their position, that PUBLIC SERVCE be allocated only 9% of those costs, *id.* at 61,642, was not adopted by the FERC, which allocated nearly twice that amount (17%) to PUBLIC SERVICE. *Id.* at 61,655.

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[2] Each of MSU's wholly-owned operating subsidiaries, PUBLIC SERVICE, AP&L, LP&L and MP&L [referred to collectively as "the Middle South System"], engages in the purchase, sale and transmission at wholesale of electricity in interstate commerce, and in the retail sale of electricity in one or more of the States of Louisiana, Mississippi, Arkansas and Missouri.

[3] Another wholly-owned MSU subsidiary owns a 90% undivided interest in Grand Gulf Unit 1, an interstate power project built in Mississippi by the Middle South System to serve System load. 31 F.E.R.C. (CCH) ¶61,305, at 61,632-33 (June 13, 1985).

PUBLIC SERVICE filed with the COUNCIL an application for recognition in its retail rates of the allocation established by FERC Opinion No. 234 as a legitimate operating expense of PUBLIC SERVICE. Timely recognition of that legitimate operating expense was critical to the financial viability of PUBLIC SERVICE (and, indeed, the entire Middle South System) because in August 1985 PUBLIC SERVICE began to pay its share of the costs allocated to it by FERC Opinion No. 234, approximately $15 million *each* month.[4] When the COUNCIL refused to act timely, PUBLIC SERVICE filed a complaint against the CITY, the COUNCIL and the individual Councilmen requesting, among other things, an order enjoining the defendants to recognize in retail electric rates the FERC-allocated costs associated with Grand Gulf 1 as a legitimate operating cost of PUBLIC SERVICE. This action was not an appeal of a rate case,[5] nor did PUBLIC SERVICE ask the federal court to make rate-making

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[4] This expense each *month* equals or exceeds what PUBLIC SERVICE typically *earns* in an entire *year*.

[5] There are no rate case issues to litigate in this federal court suit -- no question of the cost of capital, the fair rate of return, the rate base, *et cetera*. The only changed condition is a $160 million per year increase in operating expenses. The Fifth Circuit has previously recognized that an increase in operating expenses requires an increase in revenues:

> The utility's earnings, or the amount returned on investment, is its revenues minus its expenses. The utility's rate of return is therefore determined by dividing the utility's total investment by its earnings. Thus, *an increase in a utility's expenses requires a corresponding increase in a utility's revenues in order for the rate of return to remain constant.*

South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 744 F.2d 1107, 1110 (CA5 1984) (Randall, J.) (emphasis added), *vacated on other grounds*, ___ U.S. ___, 106 S.Ct. 2884, 54 U.S.L.W. 3808 (June 9, 1986)(No. 84-870); See also *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

decisions. PUBLIC SERVICE only sought prompt enforcement of a federal right: Recognition in retail rates of the FERC-mandated allocation[6] in sufficient time to avoid PUBLIC SERVICE's insolvency.

The district court denied PUBLIC SERVICE's Motion for Preliminary Injunction. Subsequently, the district court dismissed PUBLIC SERVICE's claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), holding that the Johnson Act, 28 U.S.C. §1342, which places statutory limitations on the circumstances in which a federal court can issue injunctions against state orders affecting rates of public utilities, warranted dismissal and that, in any event, *Burford* abstention, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), precluded the District Court's exercise of jurisdiction. See p. A-35.

The Court of Appeals for the Fifth Circuit granted PUBLIC SERVICE an expedited appeal. The FERC filed a brief as *amicus curiae* and presented oral argument in support of the position taken by PUBLIC SERVICE. The Fifth Circuit reversed, ruling that the Johnson Act did not preclude jurisdiction and that abstention was

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[6] Once the FERC allocates costs from utility facilities serving members of an interstate power pool, the "filed rate" doctrine requires that local utility regulators recognize *in full* those costs as legitimate operating expenses of the power pool members for retail rate-making purposes. *Nantahala Power & Light Co. v. Thornburg*, ___ U.S. ___, 106 S.Ct. 2349, 54 U.S.L.W. 4676 (June 17, 1986)(No. 85-568) ["Nantahala"]. While the local regulator might find savings, if any, by which to offset such costs, the costs have to be recognized in full; otherwise the local regulatory agencies "trap" costs in the manner proscribed by this Court in *Nantahala, supra*, 106 S.Ct. at 2359.

inappropriate. See pp. A-12, A-13.[7]

On June 10, 1986, the Fifth Circuit, which had "held" the mandate, advised the parties that it would reconsider Part IV of its opinion and requested letter briefs addressing *Burford* abstention. On September 2, 1986, the Fifth Circuit withdrew Part IV (but only Part IV) of its original opinion and issued its amending opinion,[8] affirming the district court's decision to abstain, and ordering issuance of the mandate "forthwith." See p. A-14. The FERC filed a Motion to Intervene to enable it to seek Rehearing En Banc, which Motion was denied on September 11, 1986. See p. A-33.

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[7] Partly due to that decision and to comments from the district court concerning a companion case, the COUNCIL entered into a partial settlement with PUBLIC SERVICE of the dispute between them, in which PUBLIC SERVICE reserved all of its rights and the COUNCIL reserved all of its rights, including its alleged right to reduce the level of FERC-mandated costs recognized in PUBLIC SERVICE's retail rates pursuant to an inquiry into the prudence of PUBLIC SERVICE's involvement in the Grand Gulf Project and its alleged right to abrogate PUBLIC SERVICE's contracts concerning the Grand Gulf Project (thereby attempting to eliminate all FERC-mandated costs from PUBLIC SERVICE's retail rates). The partial settlement did not contemplate or require that any litigation between the parties be dismissed.

[8] The decision of the Fifth Circuit that PUBLIC SERVICE's "statutorily based preemption claim presents a substantial federal question over which the district court has jurisdiction under 28 U.S.C. §1331" and that the Johnson Act does not deprive the federal court of jurisdiction in this matter, see Parts I, II and III, pp. A-2 through A-12, is now a final decision inasmuch as it was rendered on February 14, 1986, and no timely application for a writ was filed. Sup. Ct. R. Rule 20.4; *Federal Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952).

REASONS FOR GRANTING THE WRIT

I.
THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

This case presents an issue that has polarized the Circuits of the United States Court of Appeals, producing widespread conflict among them:

> May a federal court abstain from adjudicating a statutorily based federal preemption claim that presents a substantial federal question where there is no countervailing state interest and which claim is not the subject of a state judicial proceeding?

The Fifth Circuit's decision in this case places it in conflict with the Third, Fourth, Eighth, Ninth, Eleventh, and District of Columbia Circuits on this issue.[9] Presently,

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[9] *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111 (CA3 1986); compare *Appalachian Power Co. v. Public Serv. Comm'n of W. Va.*, 614 F. Supp. 64 (S.D. W.Va. 1985)(preliminary injunction), *aff'd*, 770 F.2d 159 (CA4 1985), 630 F. Supp. 656 (S.D. W.Va. 1986) (declaratory judgment) with *Aluminum Co. of America v. Utilities Comm'n of N.C.*, 713 F.2d 1024 (CA4 1983), *cert. denied*, 465 U.S. 1052 (1984); *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (CA8 1985), *cert. denied sub nom., Ratepayers Fight Back v. Middle South Energy, Inc.*, ___ U.S. ___, 106 S. Ct. 884, 54 U.S.L.W. 3498 (Jan. 27, 1986) (No. 85-895); *IBEW v. Public Serv. Comm'n of Nev.*, 614 F.2d 206 (CA9 1980); *Baggett v. Department of Professional Regulation, Bd. of Pilot Comm'rs*, 717 F.2d 521 (CA11 1983); *Family Div. Trial Lawyers v. Moultrie*, 725 F. 2d 695 (CADC 1984).

eight circuits[10] are in conflict over this issue, which issue is only now flowering into what may become the major legal battleground in utility regulatory matters during the latter half of the 20th century.[11]

The identical abstention issue, involving the same Grand Gulf interstate power project, was presented to the Eighth Circuit. That court held that a federal court should not abstain from adjudicating this federal preemption claim, because "[t]he very premise of this doctrine . . . is lacking when . . . federal law or Constitution makes the proceeding or regulation at issue beyond the state's authority." *Middle South Energy, Inc. v. Arkansas Public Service Comm'n, supra,* at 417.

Thus, the Fifth Circuit's ruling is in direct conflict with that of the Eighth Circuit and with its own prior rulings. See pp. 11-12, *infra.* Further, in abstention cases involving the FERC "filed rate" doctrine, the Third and Fourth Circuits are aligned with the Eighth Circuit and

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[10] The Sixth Circuit is likewise in conflict with the Third, Fourth, Eighth, Ninth, Eleventh and District of Columbia Circuits on the issue of abstention in the face of a federal preemption claim. *American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n,* No 85-5121, slip op. (CA6 Mar. 24, 1986), *petition for cert. filed,* 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49).

[11] The enormous level of investment in electric generating facilities whose output and costs are subject to the exclusive jurisdiction of the FERC has produced a high stakes contest whereby local regulators withhold recognition of FERC-approved rates until the financial strain on the utility is so great that its choices are capitulation or insolvency. The utilities then "settle" with the local regulatory authority, which thereby "traps" costs previously allocated to the utilities by the FERC. For a discussion of "trapping"costs, see *Nantahala, supra,* at 2359.

have not abstained,[12] while the Sixth Circuit has abstained.[13]

Given the number of large, relatively expensive electric generating facilities scheduled to begin operation within the next decade, this conflict among the circuits will only become more intense. In no fashion is the need for review by this Court made more evident than by the fact that a sister company of PUBLIC SERVICE was able to vindicate its federal rights in federal court merely because it is located in the Eighth Circuit, while PUBLIC SERVICE was not, because it is located in the Fifth Circuit.

II.

THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH SUPREME COURT PRECEDENT.

This Court's decisions hold that an FERC-fixed rate cannot be challenged or altered by another utility, *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); by a state court, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *or by a regulatory agency, Nantahala, supra.* Until resolved by this Court, this conflict among Circuits regarding abstention poses a significant threat to federal energy regulatory policy, a threat arising from the utilities' inability to obtain prompt vindication of their federal rights by courts

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[12] *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111 (CA3 1986); *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 614 F. Supp. 64 (S.D.W.Va. 1985), *aff'd*, 770 F.2d 159 (CA4 1985).

[13] *American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n*, No. 85-5121, slip op. (CA6 Mar. 24, 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49).

independent of parochial influence[14] and from local regulators' seeking to shield their constituency from high-cost power. Abstention by a federal court on substantial federal questions such as these is antithetical to the regulatory scheme established by the Federal Power Act, 16 U.S.C. §§791a-828c.

This Court's prior decisions do not permit abstention in the face of a federal preemption claim that raises substantial federal questions. The judicially created doctrine of abstention represents an extraordinary and narrow exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 817 (1976), and "abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest," *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-89 (1959).

This Court repeatedly has advised the federal courts that a state's interest is not more important than that of a federal regulatory agency acting pursuant to power granted by Congress. By enacting the Federal Power Act, Congress has conferred exclusive jurisdiction over the allocation of costs among interstate power pool members

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[14] Parochial influence on local regulatory decision-making prompted this Court to invalidate local regulatory conduct when it constituted protectionist legislation that "overtly blocks the flow of interstate commerce at a state's borders," *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978), and to hold that "one state in its dealings may not place itself in a position of economic isolation," *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 (1935). See also *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982).

upon a federal regulatory agency, thereby preempting local regulatory action that conflicts with, or does not embrace, the federal regulatory scheme. *Nantahala, supra; Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (1981); *FPC v. Southern California Edison Co.,* 376 U.S. 205 (1964); *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951).

Relying on this Court's mandate in these and other cases, the Third, Fourth and Eighth Circuits, and previously the Fifth Circuit, properly rejected abstention in cases arising under the Federal Power Act or the Natural Gas Act.[15]

III.

THE FIFTH CIRCUIT MISAPPLIED THE PRINCIPLE ESTABLISHED BY THIS COURT IN *BURFORD v. SUN OIL CO.,* 319 U.S. 315 (1943).

This Court's opinion in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), does not permit abstention in this case. The Fifth Circuit originally, and correctly, rejected abstention on the grounds that the basic premise of *Burford* abstention, "avoiding needless federal court intervention into important matters within a state's jurisdiction to regulate," obviously is lacking in a case in which the claim presented is predicated upon federal preemption. *New Orleans Public Service, Inc. v. City of New Orleans, at*

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[15] *This Court has specifically stated that the pertinent provisions of the Natural Gas Act and the Federal Power Act are "in all material respects substantially identical." Arkansas La. Gas Co. v. Hall,* 453 U.S. 571, 577 n.7 (1981).

p. A-13, (Randall, J.), *citing South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 744 F.2d 1107, 1123 (CA5 1984) (Randall, J.), *vacated on other grounds,* ____ U.S. ____, 106 S.Ct. 2884, 54 U.S.L.W. 3808, (June 9, 1986) (No. 84-870).

The fundamental dispute raised by PUBLIC SERVICE's complaint is not whether the COUNCIL has jurisdiction to regulate, but whether, in setting rates, the COUNCIL must recognize as PUBLIC SERVICE's legitimate operating expenses the Grand Gulf 1 costs determined by the FERC. If the COUNCIL fails to recognize as a legitimate operating expense the FERC-allocated costs, the federal court cannot be said to be intervening in a matter subject to the COUNCIL's jurisdiction because the COUNCIL has no discretion in such matters. *Nantahala, supra,* at 2359. Deference is not given to a state regulatory scheme when its existence conflicts with the federal scheme of regulation. *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963).

This case does not involve resolution of a state law issue. No valid state law permits a local regulatory agency to use or adopt any rate other than that fixed by the FERC. As the Third Circuit acknowledged in *Kentucky West Virginia Gas:* There is "no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy." 791 F.2d at 1116, *quoting Zablocki v. Redhail,* 434 U.S. 374, 379-80 n.5 (1978).

In *Burford,* this Court held that a federal court should abstain when called upon to decide issues of *state* law where an erroneous decision might disrupt a complex

state regulatory scheme. The error of the lower courts on the issue of abstention is readily apparent: The complaint in this case asks a federal court to decide *federal*, not *state* issues. In fact, the situation here is exactly opposite that presented in *Burford*: An erroneous decision by a *state* court in this case would disrupt the *federal* regulatory scheme. State courts in four separate jurisdictions might easily disagree among themselves over an issue so fraught with parochial bias.

The Johnson Act, 28 U.S.C. §1342, is a specific Congressional expression regarding the circumstances in which the federal courts must refuse to exercise their jurisdiction over utility matters, i.e., it is the abstention doctrine for utility related cases. Where, as here, a federal court finds jurisdiction but abstains despite that Congressional expression, invoking abstention is tantamount to judicial repeal of the Johnson Act.

IV.

THE FIFTH CIRCUIT MISAPPLIED THE PRINCIPLE ESTABLISHED BY THIS COURT IN *YOUNGER v. HARRIS*, 401 U.S. 37 (1971).

A. THE THREE-PRONG TEST FOR *YOUNGER* ABSTENTION

There is a three-prong test to determine whether a federal court should abstain under the *Younger* doctrine:

1) A state *judicial* proceeding must be ongoing;
2) That proceeding must involve enforcement of important state interests; and
3) The plaintiff must have an opportunity in that proceeding to raise its federal constitutional challenge.

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432 (1982).

The Fifth Circuit erred in finding that the facts in this case satisfied this Court's test. This Court has ruled that "*Younger* is not a bar to federal court action when state *judicial* proceedings have not themselves commenced." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 238-39 (1984) (emphasis added). Contrary to the Fifth Circuit's amending opinion (see p. A-23), there is not now, nor has there ever been, any state *judicial* proceeding in this case. The proceedings before the COUNCIL are not *judicial* in nature.[16] Accordingly, the first prong of the *Middlesex* test, that there be a pending *judicial* proceeding, is not satisfied.

The second prong of the *Middlesex* test, that the proceedings must implicate important state interests, is likewise not met in this case. Contrary to the Fifth Circuit's amending opinion (p. A-23, A-24), the "important state interest"[17] at stake is not "setting retail rates," a

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[16] A rate proceeding before a local regulatory body in Louisiana is legislative in nature, not judicial. The COUNCIL is the legislative branch of city government; indeed, in response to PUBLIC SERVICE's 42 U.S.C. §1983 claim, the COUNCIL pled legislative immunity as a defense. Further, the law of this Court and of Louisiana is consistent that a local regulator's power to regulate retail rates is a legislative function. *Home Tel. & Tel. Co. v. City of Los Angeles,* 211 U.S. 265 (1908); *Louisiana Gas Serv. Co. v. Louisiana Pub. Serv. Comm'n,* 245 La. 1029, 162 So.2d 555 (1964); *Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 187 La. 137, 174 So. 180 (1937); *McNeely v. Town of Vidalia,* 157 La. 338, 102 So. 422 (1924).

[17] Other frequently recognized indicia of whether a state's interest is "important" within the meaning of the second prong of the *Middlesex* test are whether the state is the plaintiff in the state court action, and whether the state court action was an enforcement, as opposed to a remedial, proceeding. These indicia are not present in this case. The First, Third, Fifth, Sixth and Ninth Circuits have previously held that *Younger* abstention is not appropriate unless the state was the plaintiff in the state court action. *Martori Bros. Distrib's v. James-Massengale,*

process PUBLIC SERVICE has not sought to enjoin. PUBLIC SERVICE has not challenged the COUNCIL's right to determine whether cost savings in other areas may permit some reduction in retail rates. The interest in dispute in federal court was the right of PUBLIC SERVICE to recover FERC-mandated costs, which neither the COUNCIL nor the state courts have authority to alter, and therefore, a matter upon which those state entities "may not entrench." *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Commission*, 791 F.2d 1111, 1116 (CA3 1986); *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404, 417 (CA8 1985), *cert. denied sub nom., Ratepayers Fight Back v. Middle South Energy, Inc.*, ____ U.S. ____, 106 S.Ct. 884, 54 U.S.L.W. 3498 (Jan. 27, 1986) (No. 85-895). For these reasons, the second prong of the *Middlesex* test is not met.

The third prong, that there be an adequate opportunity to present the federal claims before the state tribunal, likewise is not met. The legislative branch of municipal government, a non-judicial body, is not an appropriate forum in which to raise federal claims. If an administrative agency, acting in a legislative capacity, were an adequate forum to resolve federal claims, a federal plaintiff would have to exhaust administrative remedies before filing a 42 U.S.C. §1983 claim such as that filed by

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(footnote 17 continued)
781 F.2d 1349, 1356 n.12 (CA9 1986) citing authority from each of those Circuits. The Fifth Circuit has now "declined to adopt" that view. See p. A-22, n.2. The *Younger* abstention cases fall into three principal categories, but all categories involve enforcement rather than remedial proceedings: State criminal proceedings in which the state is the plaintiff, *Younger, supra;* cases that involve or are related to penal statutes or penalties, *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975); cases that involve the state's court system, or in which the state is the plaintiff to exercise rights granted under specific state statutes, *Middlesex, supra.*

PUBLIC SERVICE in this case. That is not the law;[18] the third prong is not met.

There are exceptions to the *Younger* doctrine that preclude its application even if the *Middlesex* test were satisfied. These exceptions include bias by the agency[19]

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[18] The underpinnings of the *Younger* doctrine are that the federal court should abstain absent some specific Congressional intention otherwise. Congressional intention to the contrary is expressed in this case both in 42 U.S.C. §1983, see *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and in the Federal Power Act, 16 U.S.C. §§791-828c (1985). For purposes of dismissal on the basis of *Younger* abstention, without a retention of jurisdiction, the dismissal should be treated as a dismissal under Fed. R. Civ. P. 12(b)(6), and therefore PUBLIC SERVICE's allegations with respect to its §1983 claim should be treated as true. That being the case, PUBLIC SERVICE has made out a prima facie case upon its allegations of bias of the administrative agency, which under *Gibson v. Berryhill*, 411 U.S. 564 (1973), precludes *Younger* abstention, and would not require exhaustion of administrative remedies. See *Patsy, supra; City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24 (1934).

[19] A colorable claim of state bias precludes *Younger* abstention. *Gibson v. Berryhill*, 411 U.S. 564 (1973). For reasons analogous to those in *Berryhill*, abstention is improper in this case. In *Berryhill*, the agency was an adverse party that had sued the applicant over the very issue before that agency. Here, the COUNCIL was and is an adverse party before the FERC and the D.C. Circuit over the very issue before it, PUBLIC SERVICE's FERC-allocated costs. In *Berryhill*, the Court found a viable claim that the agency had a financial stake in the matter before it. Here, as in *Berryhill*, the COUNCIL has already created a local utility authority to take over, finance and operate the electric utility business of PUBLIC SERVICE. This viable claim clearly falls within the scope of this Court's decision in *Gibson v. Berryhill*, so as to preclude application of the *Younger* doctrine.

and irreparable injury to the federal plaintiff.[20]

To hold simply that the *Younger* doctrine applies *every* time a state asserts any possible interest would constitute an unwarranted expansion of the doctrine and in this case would effect the judicial repeal of the Johnson Act, 28 U.S.C. §1342. That Act specifically contemplates the exercise by federal courts of their jurisdiction and federal intervention in utility proceedings. Were the *Younger* doctrine expanded so as to encompass utility regulatory proceedings, the Johnson Act would be effectively repealed and federal courts would be required to abstain in every case of that type. The Fifth Circuit's new approach in this case cannot be a correct or proper expansion of the *Younger* doctrine.

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[20] This Court settled that a utility can show irreparable harm or injury as a result of loss through exhaustion of the very right it seeks to protect -- the right to be free of a local administrative proceeding on matters beyond its authority. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (decision on preemption of state nuclear-waste disposal law should not be delayed because postponement "would likely work substantial hardship on the utilities"); *Public Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943) (court upheld an injunction against the local regulatory authority on the grounds that the utility suffered injury from the mere fact that it might have to obtain local agency approval of the reasonableness of charges previously addressed by the federal regulatory agency); and *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.")

CONCLUSION

In a case in which several federal courts of appeals are in direct conflict, in which a federal court has failed to follow Supreme Court precedent, in which neither the *Burford* nor the *Younger* abstention doctrines properly apply because there is no countervailing state interest, and where the effect of abstaining is to judicially repeal a federal statute, a writ of certiorari must issue.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3654

NEW ORLEANS PUBLIC SERVICE, INC.,
Plaintiff-Appellant,

v.

THE CITY OF NEW ORLEANS,
THE COUNCIL FOR THE CITY OF
NEW ORLEANS, SIDNEY J. BARTHELEMY,
ET AL.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

(February 14, 1986)

Before RANDALL and WILLIAMS, Circuit Judges, and HINOJOSA,* District Judge.

RANDALL, Circuit Judge:

Appellant New Orleans Public Service, Inc. appeals the district court's dismissal of this cause of action for lack of subject matter jurisdiction and the district court's decision to abstain. We reverse and remand.

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* District Judge of the Southern District of Texas, sitting by designation.

I.

Appellant New Orleans Public Service, Inc. ("NOPSI"), a subsidiary of Middle South Utilities Inc. ("MSU"), provides electric services to most of the City of New Orleans. NOPSI also engages in the production, wholesale interstate purchase, wholesale interstate sale and retail sale of electric power. The genesis of this case is an "Opinion and Order Setting Just [sic]Reasonable and Non-Discriminatory Rates," 31 F.E.R.C. (CCH) ¶ 61,305 (June 13, 1985) ("Opinion No. 234"), issued by the Federal Energy Regulatory Commission ("FERC"), allocating the cost of Grand Gulf Unit One, a 1250 megawatt nuclear power plant located in Port Gibson, Mississippi, among four MSU subsidiaries: Arkansas Power & Light Co.; Louisiana Power & Light Co.; Mississippi Power & Light Co.; and NOPSI.[1] NOPSI's share of the costs was 17%. In July 1985, NOPSI accordingly began paying its 17% of the costs, 15.5 million dollars a month.

On May 17, 1985, NOPSI filed an application for a permanent rate increase with Appellee Council for the City of New Orleans ("the Council"). On July 25, 1985, the Council entered a resolution requiring NOPSI to refile its application and directing NOPSI to file a request for interim rate relief. Emergency interim relief was granted by the Council on September 5, 1985. In its interim relief order, the Conncil directed NOPSI to freeze electric rates until further regulatory action. The Council noted that NOPSI's immediate cash flow problems could be alleviated by NOPSI's issuance of 35 million dollars in securities

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[1] Opinion No. 234 is presently the subject of a direct appeal in the D.C. Circuit.

pending the approval of the Securities and Exchange Commission; the repayment of 32 million dollars in cash advances made by NOPSI to an MSU subsidiary; and the continued omission of NOPSI's dividend payments on common stock to MSU.

NOPSI sought injunctive relief from the Council's order in the district court. NOPSI first raised a statutorily-based preemption claim. NOPSI alleged that the Council, in setting NOPSI's retail rates, had refused to recognize the expenses NOPSI was required to pay by FERC order: the Council's rate freeze assumed in essence that the FERC opinion had never been issued, and that NOPSI was obtaining no Grand Gulf Unit I power. The refusal to recognize FERC-determined wholesale costs for retail rate-making purposes frustrated the FERC order allocating costs, thereby violating FERC's exclusive authority to regulate wholesale energy under the Federal Power Act, 16 U.S.C. §§ 824-824K. NOPSI also claimed that the Council's refusal to honor the FERC order constituted an impermissible burden on interstate commerce, as NOPSI would be rendered insolvent; the FERC order allocating costs among companies in several states would be frustrated; financial agreements among the MSU companies would be harmed; the operation of Grand Gulf Unit One would be threatened; and the viability of the interstate integrated electric system would be seriously undermined.

The district court dismissed NOPSI's claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), because of the Johnson Act, 28 U.S.C. § 1342. The Johnson Act places statutory limitations on the circumstances in which a federal court can issue injunctions against state orders affecting rates of public utilities. The Johnson Act provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearings; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

If all four criteria of the Johnson Act are met, the Act will bar federal jurisdiction. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107, 1123 n.28 (5th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3449 (Nov. 30, 1984) (84-870). NOPSI contended that the first two criteria of the Johnson Act -- that jurisdiction be based solely on diversity of citizenship or repugnance of the order to the Federal Constitution, and that the order not interfere with interstate commerce -- had not here been met, and that the district court thus had jurisdiction over the case.[2]

The district court found otherwise. Although NOPSI's complaint had claimed federal question jurisdiction

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[2] NOPSI does not on appeal address the applicability of the third and fourth criteria of the Johnson Act, but confines itself to disputing the applicability of the first and second criteria. Appellant's Brief at 40. Thus, we will not consider whether the third and fourth criteria of the Johnson Act here apply.

under 28 U.S.C §§ 1331, the district court did not address whether NOPSI had presented a federal question arising under a federal law, but instead discussed the applicability of a particular jurisdictional provision of the Federal Power Act, § 825p, a provision which serves to reinforce the general jurisdictional provisions governing the federal district courts. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 257 (1951) (Frankfurter, J., dissenting). Under § 825p of the Federal Power Act, federal district courts have exclusive jurisdiction over actions "brought to enforce any liability or duty created by or to enjoin any violation" of a FERC opinion or order.[3] Although NOPSI asserted that the FERC opinion created a "duty" on the part of the Council to pass through to its retail rate payers the costs incurred by NOPSI as a result of its 17% FERC cost allocation, the district court's own review of the FERC opinion convinced the court that no "duty" had been created therein. There was no mandate to pass through the expenses allocated by FERC; indeed, "such a provision [was] conspicuous by its absence." Record Vol. 2 at 330. The FERC opinion merely prescribed the interstate wholesale rates that NOPSI would have to pay for its share of Grand Gulf Unit I energy. Given its interpretation of the FERC opinion, the district court found that jurisdiction under § 825p of the Federal Power Act was lacking, and apparently also reasoned that NOPSI _____

[3] Section 825p provides in relevant part:

> The District Courts of the United States, and the United States Courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

could not sustain its statutorily-based claim of federal preemption. Without this statutorily-based claim, jurisdiction rested "solely" on "repugnance of the order to the Federal Constitution," satisfying the first criterion of the Johnson Act. The district court also found that the Council's order did not interfere with interstate commerce, satisfying the second criterion of the Johnson Act. Because the district court concluded that the two Johnson Act criteria challenged by NOPSI had been met, federal jurisdiction was precluded.

Finally, the district court observed that even if it were to find that the Johnson Act did not bar adjudication of NOPSI's request for relief from the Council's regulatory authority, the jurisprudential doctrine of abstention would dictate a similar result. Citing *Burford v. Sun Oil*, 319 U.S. 315 (1943), the district court concluded that it should exercise a "hands-off policy" in reference to the Council's local rate-making.

II.

NOPSI on appeal contends that the district court erred in dismissing this case for lack of subject matter jurisdiction. We agree. In dismissing this case, the district court first considered NOPSI's claims within the jurisdictional grant of 16 U.S.C. §825p. As discussed above, the district court found from its own review of the FERC opinion that a pass through of NOPSI's costs was not explicitly mandated therein, and was in fact "conspicuous by its

absence," thereby precluding jurisdiction under § 825p.[4] We need not and do not decide, however, whether the federal court had jurisdiction of this matter under § 825p, for federal jurisdiction over NOPSI's statutorily-based preemption claim can be sustained under a different jurisdictional grant: 28 U.S.C. § 1331. Section 1331 provides for federal jurisdiction over questions "arising

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[4] We need not now decide whether the FERC opinion contemplates a pass through of costs to retail rate payers. We note that FERC adopted the cost allocation recommended by the administrative law judge below, and in so doing commented approvingly that the judge had "concluded that the costs of Grand Gulf capacity and energy should be shared equitably by all four operating companies *and their customers.*" Record Vol. 1 at 35 (emphasis added). Both NOPSI and FERC, writing here as amicus curiae, contend that the FERC opinion thus allocated the Grand Gulf Unit One costs to NOPSI *and its customers,* thereby preempting contrary local action and mandating Council recognition and pass through of the costs. Certainly the above quoted language would call into question the district court's conclusion that a pass through provision is "conspicuous by its absence." Moreover, a recent D.C. Circuit opinion, while addressing an issue different from that raised by NOPSI here, encountered no difficulty in construing the same FERC opinion before us today, Opinion No. 234, to "impose [upon] Arkansas Power and Light Company *(and hence upon its rate payers)* a thirty-six percent share of the cost of the Grand Gulf Nuclear Plant." *Reynolds Metals Company v. FERC,* 777 F.2d 760 (D.C. Cir. 1985) (emphasis added) (dismissing as premature an emergency petition and motion for stay seeking relief from FERC refusal to include refund obligation in order and denying injunction sought by major customer of electric utility as FERC retained authority to order refunds). Finally, at least one Circuit has held that § 825p does not require an undisputed violation of a clear FERC opinion before jurisdiction may be assumed by the district court. Rather, parties may heatedly dispute the effect and interpretation to be given a FERC opinion and still obtain federal jurisdiction under § 825p *State of California v. Oroville-Wyandotte Irrigation District,* 411 F. Supp. 361 (E.D. Ca. 1975), *aff'd,* 536 F.2d 304 (9th Cir.), *cert. denied,* 429 U.S. 922 (1976) (finding jurisdiction under 16 U.S.C. § 825p even where there was a conflict in the way different agencies interpreted the effect of decisions by the FPC [precursor to FERC] and the California Public Utilities Commission, and concluding ultimately that the two decisions did not conflict).

under" a federal law.[5] As noted by the Supreme Court, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Franchise Tax Board v. Construction Laborers Trust,* 463 U.S. 1, 8 (1983). However, an action may "arise under" federal law when "in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law." *Id.* at 9 (quoting P. Bator, P. Mishken, D. Shapiro & H. Wechsler, *Hart & Welchsler's The Federal Court's and the Federal System* 889 (2d ed. 1973)). Indeed, the Supreme Court has recently observed that a "plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines Inc.,* 463 U.S. 85, 96 n.14 (1983). Of course, to avoid dismissal under Fed. R. Civ. P. 12(b)(1), the question presented must be "substantial." A complaint's allegations are "insubstantial if they are obviously without merit or if prior decisions foreclose controversy on the subject." *In re Carter,* 618 F.2d 1093, 1103 (5th Cir. 1980), *cert. denied,* 450 U.S. 949 (1981). So rigorous is the test for dismissal under Rule 12(b)(1) that if there is "any foundation of plausibility to the claim, federal jurisdiction exists." *Meason v. Bank of Miami,* 652 F.2d 542, 547 (5th Cir. 1981), *cert. denied,* 455 U.S. 939 (1982) (quoting 13 C. Wright & Miller, *Federal Practice & Procedure* § 3564 at

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[5] 28 U.S.C. §1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

428 (1975)). We now turn to consider NOPSI's statutorily-based preemption claim.

NOPSI's preemption claim does not depend, as the district court seemed to think, upon an explicit FERC mandate to pass through costs. Rather, NOPSI contends that the Council's refusal to recognize the FERC-determined wholesale costs intrudes upon and frustrates the FERC determination in violation of Congress' intent that exclusive authority over wholesale rates be vested with FERC under the Federal Power Act. In 1935, with Part II of the Federal Power Act, 16 U.S.C §§ 824-824k, Congress "delegated to the Federal Power Commission [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). The 1935 enactment was a "direct result" of the Supreme Court's holding in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), "that the states lacked power to regulate the rates governing interstate sales of electricity for resale." *New England Power Co.*, 455 U.S. at 340. Congress created a "bright line" between federal and state jurisdiction, denying "state power to regulate a sale 'at wholesale to local distributing companies' and allow[ing] state regulation of a sale at 'local retail rates to ultimate consumers.' " *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205, 214 (1964) (quoting *Illinois National Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 504 (1942)). The exclusive authority granted FERC over wholesale rates led the Supreme Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951), a case which itself invoked the federal question jurisdiction of 28 U.S.C.

§ 1331, to rule that "the right to a reasonable rate is the right to the rate which [FERC] files or fixes, and . . . the courts can assume no right to a different one." Invoking the reasoning of *Montana-Dakota*, NOPSI argues that the states, like the courts, must recognize FERC-determined wholesale rates. In sum, NOPSI contends that the preemptive effect of the Federal Power Act and the *Montana-Dakota* holding forbid the states from intruding upon an area determined by Congress to be within the exclusive jurisdiction of FERC: the setting of wholesale costs.

NOPSI cites several state Supreme Court cases to support its preemption argument. *See Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978) (finding that the rate increase in the cost of electricity to Narragansett constituted a reasonable operating expense and should be so viewed by the local rate-making authority); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981) (holding that for purposes of fixing intrastate rates, the doctrine of federal preemption required the local Public Service Commission to treat the interstate wholesale rate filed with FERC as a reasonable operating expense); *Northern States Power Co. v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn.) *cert. denied*, 104 S. Ct. 3546 (1984) (holding that the Minnesota Public Utilities Commission was required to recognize the losses under a FERC-determined wholesale rate as expenses for power purchased in determining retail rates to be charged to Minnesota rate payers and noting that in general regulators have allowed recovery of such costs through retail rates). In addition, in *Appalachian Power Co. v. Public Service Commission of West Virginia*, 614 F. Supp. 64 (S.D. W.Va. 1985), the plaintiff power

company, like NOPSI here, sought injunctive relief to enjoin the local regulatory commission from denying the company recovery of costs to be incurred under a FERC order. The plaintiff claimed that the FERC order preempted the commission's refusal to pass through the costs. The district court agreed. Basing its subject matter jurisdiction in part upon 28 U.S.C. § 1331, the district court granted the injunctive relief sought, finding that the local commission had infringed upon "the FERC's exclusive authority to regulate the transmission and sale of energy in interstate commerce." *Id.* at 73.

Given the above, we find that absent application of the Johnson Act, NOPSI's statutorily-based preemption claim presents a substantial federal question over which the district court has jurisdiction under 28 U.S.C. § 1331. However, we do not decide, as NOPSI contends we must, whether NOPSI will prevail in its preemption claim. Achieving federal jurisdiction does not guarantee success on the merits of a claim. *See Montana-Dakota*, 341 U.S. at 249. We therefore do not determine whether the Council must immediately pass through NOPSI's costs. Indeed, the *Narragansett* case, on which NOPSI so heavily relies, did not itself require immediate pass through of costs to retail rate payers, but held instead that "we do not order the local commission to automatically adjust the retail rates . . . . [W]e remand the case to the [local commission] with the direction that no matter what method it adopts in considering Narrangansett's [sic] proposed rate increase it must treat the FPC filed and bonded purchase price to NEPCO as an actual operating expense." 381 A.2d at 1363.

III.

We now must determine whether the Johnson Act applies to bar federal jurisdiction over NOPSI's claim. We conclude that it does not. The Johnson Act removes federal jurisdiction of claims which rely "solely" on "repugnance of the order to the Federal Constitution." As NOPSI's claim raises a federal question about the preemptory effect of the Federal Power Act, it cannot be seen to rely "solely" on constitutional grounds. A statutorily-based preemption claim will not provide a basis for invoking the Johnson Act to deprive the federal courts of jurisdiction. *See International Brotherhood of Electric [sic] Workers v. Public Service Commission of Nevada*, 614 F. 2d 206 (9th Cir. 1980) (finding that although a challenge to a local rate order based on statutory preemption could be regarded as constitutional for some purposes, it would not be so seen for purposes of the Johnson Act, for jurisdiction was not based solely on repugnance of the order to the Federal Constitution, but rested in part upon proper interpretation of a federal statute and on general federal question jurisdiction); *Aluminum Company of America v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984) (refusing to apply the Johnson Act as a bar to federal jurisdiction when jurisdiction was based upon federal questions and preemption). As we find that the first criterion of the Johnson Act -- that jurisdiction be based solely on repugnance of the order to the Federal Constitution -- has not here been met, we hold that the district court erred in applying the Johnson Act to bar its jurisdiction.[6]

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[6] As noted above, for federal jurisdiction to be barred by the application of the Johnson Act, all four criteria of the Act must be met. Because we find that the first criterion has not here been met and conclude therefore that the Johnson Act was wrongly applied to NOPSI's claims, we need not consider whether the second criterion of the Act -- that the order not interfere with interstate commerce -- has or has not also been met.

IV.

Finally, we find that this case is not an appropriate one for abstention. The doctrine of abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate controversies properly before it." *County of Allegheny v. Frank Mastruda Co.*, 360 U.S. 185, 188-89 (1959). The *Burford*-type abstention invoked by the district court below is appropriate when a case involves an essentially local issue arising out of a complicated state regulatory scheme. *See International Brotherhood of Electric [sic] Workers*, 614 F.2d at 213. When Congress has created a statutory scheme, such as the Federal Power Act, which arguably preempts the local regulation complained of, a fundamental element of *Burford* abstention is thrown into doubt, for we must question whether the case indeed involves an essentially local issue. When the claim presented is predicated upon federal preemption, "it is well established that 'the basic premise of abstention -- avoiding needless federal court intervention into important matters within a State's jurisdiction to regulate -- obviously is lacking.' " *South Central Bell Telephone*, 744 F.2d at 1123 (quoting *Aluminum Co. of America*, 713 F.2d at 1030). We therefore find that the district court erred in abstaining, and remand this case to the district court for decision on the merits.

For the above reasons the order of the district court dismissing this case for lack of subject matter jurisdiction and on abstention grounds is REVERSED and REMANDED for decision on the merits.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3654

NEW ORLEANS PUBLIC SERVICE, INC.,
Plaintiff-Appellant,

v.

THE CITY OF NEW ORLEANS,
THE COUNCIL FOR THE CITY OF
NEW ORLEANS, SIDNEY J. BARTHELEMY,
ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(September 2, 1986)

Before RANDALL and WILLIAMS, Circuit Judges, and HINOJOSA*, District Judge.

RANDALL, Circuit Judge:

After reconsidering our opinion in *New Orleans Public Service, Inc. v. The City of New Orleans,* 782 F.2d 1236 (5th Cir. 1986), we have decided to withdraw Part IV of our opinion, and substitute in its place the following:

* District Judge of the Southern District of Texas, sitting by designation.

IV.

The district court concluded that the jurisprudential doctrine of abstention barred adjudication of NOPSI's request for relief from the Council's regulatory authority. Although we recognize that abstention in the face of a federal preemption claim is, at a minimum, problematical, we conclude on the facts before us that the district court did not abuse its discretion by abstaining in the instant case.

Our conclusion that the district court properly exercised its discretion is informed by the particular structure of the Federal Power Act. As noted in our initial opinion in this case, with Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, Congress in 1935 "delegated to the Federal Power Commission, now the Federal Energy Regulatory Commission [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). This 1935 enactment was a "direct result" of the Supreme Court's holding in *Public Utilities Commission v. Attleboro Steam and Electric Company*, 273 U.S. 83 (1927), "that the states lacked power to regulate the rates governing interstate sales of electricity for resale." *New England Power Co.*, 455 U.S. at 340. The Federal Power Act, however, explicitly denied FERC jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). Congress created a "bright line" between federal and state jurisdiction, denying "state power to regulate a sale 'at wholesale to local distributing

companies' and allow[ing] state regulation of the sale at 'local retail rates to ultimate consumers.' " *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205, 214 (1964) (quoting *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 504 (1942)). *Cf. Louisiana Public Service Commission v. F.C.C.*, 106 S. Ct. 1890 (1986) (discussing dual system of state and federal regulation over telephone service embodied by Communications Act of 1934; concluding that Act did not preempt state regulation over depreciation of dual jurisdiction property for intrastate rate making purposes).

The existence of this "bright line" colors the way we view a preemption claim involving the Federal Power Act. NOPSI has attempted to depict the situation before us as one in which the Council is stepping into the realm of *wholesale* rate making, a field under the exclusive jurisdiction of FERC. NOPSI focuses on the disruption of a *federal* scheme. Yet federal court intervention here may constitute a disruption of a *state* regulatory scheme, for *retail* rate making is clearly a field left to the jurisdiction of the states. While the recent Supreme Court case of *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986), required that the local council recognize the FERC-determined wholesale costs, local control over retail rate making is not preempted by federal law: *Nantahala* recognizes that retail rates need not necessarily be increased to reflect the corresponding increase in wholesale rates set by FERC. Instead, local councils are permitted the autonomy preserved to them by the Federal Power Act and can consider cost savings in other areas relevant to the setting of retail rates. 106 S. Ct. at 2357-58.

Thus, under the Federal Power Act, the wholesale rates set by FERC, although a matter of national concern, are effectuated at the retail level only by local institutions. The structure of the Federal Power Act, preserving as it does state jurisdiction over retail rates, suggests that these local institutions should normally proceed unfettered by federal interference. Although we do not intimate that abstention in the face of a preemption claim under the Federal Power Act may never constitute an abuse of discretion, abstention should perhaps more often obtain in cases presenting a question of preemption under the Federal Power Act than would be so in cases presenting other types of federal preemption claims.

In deciding to abstain, the district court focused upon a variant of abstention known as *Burford* abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), concerned an attack upon the validity of an order of the Texas Railroad Commission granting a permit to drill oil wells. Jurisdiction of the federal district court was invoked because of diversity and a federal due process claim. Although federal jurisdiction was assumed to exist, the Supreme Court nevertheless agreed with the district court's decision that it should decline to exercise such jurisdiction. The Supreme Court explained that the Texas regulatory system governing oil conservation was complex and a matter of great public importance. The Court noted that Texas had established in its own state courts a system of "thorough judicial review" of the Railroad Commission's orders and that this review system was concentrated in the state courts of Travis County. 319 U.S. at 325. Texas courts were perfectly capable of giving relief. Should the federal courts exercise their jurisdiction, delay, confusion and "needless federal conflict with the state policy [would be]

the inevitable product of this double system of review." *Id.* at 327. Moreover, ultimate review of the federal questions remained fully preserved in the United States Supreme Court. *Id.* at 334.

Later, in *Alabama Public Service Commission v. Southern R. Co.*, 341 U.S. 341 (1951), the Supreme Court determined that abstention was required in a challenge to a state Railroad Commission order. The plaintiff railroad in this case had been denied permission by the state commission to discontinue intrastate passenger service. The railroad filed suit in federal court, basing jurisdiction on diversity and a federal claim of confiscation. To support its invocation of abstention, the Supreme Court reasoned:

> As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts." Considering that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor then [sic] the avoidance of needless friction with state policies," the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.

341 U.S. at 349 (citations omitted).

Burford and *Alabama Public Service Commission*, while resting federal jurisdiction in part upon federal questions, also involved questions of state law. Although NOPSI argues that these abstention cases can thus be distinguished from the instant case, where no state law issue seems relevant, we find that the absence of a state law claim in the instant case is not fatal to *Burford* abstention. The motivating force behind *Burford* abstention is not the desire to avoid a state law question, but rather, a reluctance to intrude into state proceedings where there exists a complex state regulatory system. As we have previously observed, "*Burford*-type abstention requires neither the presence of a state issue nor unclarity in pertinent state law. Rather, a court abstaining under *Burford* relegates a federal issue to state court adjudication because the federal issue touches some overriding state interest." *B.T. Inv. Managers v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977).

Given the facts before us and the structure of the Federal Power Act, which leaves jurisdiction over retail rates to the states, we conclude that the district court did not abuse its discretion in finding *Burford* abstention appropriate here. As with the regulatory scheme at issue in *Burford*, the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory scheme is complex. In addition, the Louisiana state courts are fully able to address NOPSI's complaints about Council actions: appeals from Council orders are to be filed with the Civil District Court for the Parish of Orleans. Significantly, NOPSI has not denied that adequate state court remedies exist. That the state courts often capably address claims such as that raised by NOPSI is apparent

from the number of state court cases upon which NOPSI relies to prove its preemption claim substantial. Nor would federal abstention foreclose the United States Supreme Court from entertaining NOPSI's preemption claim should it wind its way up through the state courts, as is demonstrated by the path of the recent Nantahala case.[1]

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[1] The question of *Burford* abstention in the face of a preemption claim involving the Federal Power Act has led the circuit courts to various results. In *Aluminum Co. of America v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), Alcoa and Tapoco sought an injunction from the federal district court against a local council order which considered Alcoa subsidiaries to be a single system for purposes of calculating the rate base. Alcoa and Tapoco claimed that the order "allegedly interfere[d] with the operation of a federal regulatory scheme and impermissibly burden[ed] interstate commerce." 713 F.2d at 1025. The district court abstained. The Fourth Circuit affirmed, explaining that the case involved the "quintessential *Burford* setting of a complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded." *Id.* at 1029. The court continued: "The usual rule of comity must govern; the district court properly exercised its discretionary power to withhold relief so as to avoid needless obstruction of North Carolina's domestic policy." *Id.* The court declined to adopt a *per se* rule against abstention whenever a federal plaintiff asserted a preemption claim. In *American Electric Power Co. v. Kentucky Public Service Commission*, No. 85-5129 (6th Cir. Mar. 24, 1986), a public utility company challenged a local commission's rate order in both state and federal courts. FERC had accepted a unit power agreement as a rate schedule. When the utility company tried to pass through its cost to retail rate payers, the local commission balked, refusing to increase retail rates. The *per curiam* opinion of the court rejects *Burford* abstention in favor of *Younger* abstention. However, the two concurring opinions by Judges Contie and DeMascio invoke *Burford* abstention, noting that although *Burford* did involve the review of a state law question, the Supreme Court focused not on the presence of this state law issue, but instead on the disruption of a state policy. Here, as in *Burford*, there existed a complex state regulatory scheme which would be disrupted by federal court review, and there also existed a state created forum with expertise.

Not all courts facing preemption claims have chosen to abstain. Perhaps the strongest argument against abstention can be found [sic] a footnote in a Ninth Circuit opinion, which notes, "[i]f a preeemption claim is well-founded, therefore, *Burford* abstention cannot be appropriate."

Moreover, on these facts, abstention seems appropriate under the doctrine of *Younger v. Harris*, 401 U.S.

(footnote 1 continued)

International Brotherhood of Electric [sic] *Workers, Local Union No. 1245 v. Public Service Commission of Nevada*, 614 F.2d 206, 212 n.1 (9th Cir. 1980). Although the Ninth Circuit's language is strong, it must be noted that the case does not involve the Federal Power Act with its preservation of state jurisdiction over retail rates. In addition, the court's apparent *per se* rule against *Burford* abstention appears to be unneccessary [sic] dictum in the context of the case, where no state policy was at issue, and where federal review would not disrupt the state regulation.

Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission, 791 F.2d 1111 (3rd Cir. 1986), involved the Pennsylvania statutory framework under which retail rates were established for natural gas companies. One utility company sought to pass through the costs passed onto it by FERC-approved tariffs, and the local utility council denied the pass through. The company brought suit in state and federal courts, alleging to the federal district court that the local order and the Pennsylvania statute were preempted by the Natural Gas Act. The district court abstained. Relying in part on our prior opinion in this case, the Third Circuit reversed, reconciling its opinion with *Aluminum Co.* by noting that the case before it raised a direct conflict between state and federal statutes. Finally, in the recent case of *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986), Middle South Energy sought the issuance of an injunction which would prevent the state public service commission from conducting further proceedings into the utility's contracts regarding the purchase of nuclear power. The same FERC order at issue in the instant case had assigned the cost of a nuclear power plant amongst four companies. The state commission did not refuse to recognize the FERC-determined costs, but instead tried to avoid the underlying contracts to purchase nuclear power. The Eighth Circuit refused to abstain, reasoning that abstention is inappropriate when the proceeding -- the commission's attempt to void the underlying contracts to purchase nuclear power -- is beyond the state's authority. *Middle South Energy* can be distinguished from the instant case, as NOPSI is not alleging in the instant suit that the Council's proceeding is beyond its authority. No one disputes that the Council can set retail rates. NOPSI only asks that the Council recognize FERC-determined costs within the Council's rate-making proceeding.

37 (1971).[2] *Younger* and its progeny "espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). The doctrine is driven by:

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

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[2] *Younger* abstention is most typically invoked in situations where the state has initiated an action against a state defendant who subsequently seeks federal relief – a procedural model which NOPSI does not fit. The Third Circuit has concluded that unless the state has initiated the state proceeding, the state interest is not sufficiently important to justify abstention. *Johnson v. Kelly*, 583 F.2d 1242, 1249 (3d Cir. 1978). This view, however, has been "vigorously criticized," 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4254 at 216 (Supp. 1986), (hereinafter "Wright and Miller"), and we decline to adopt it. Rather, we agree with a recent commentator that "state initiation of the proceeding is a poor measure of the state interest" in its substantive policies. Comment, *Limiting the Younger Doctrine: A Critique and Proposal*, 67 Calif. L. Rev. 1318, 1344 (1979). Thus, we do not find the procedural posture of NOPSI in the state proceeding to defeat the application of *Younger* abstention. We find support for our conclusion in *American Electric Power Co.*, where the Sixth Circuit abstained under *Younger* in circumstances similar to ours, despite the fact that the federal plaintiff was procedurally also a plaintiff in the pending state action. *But see Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111 (3d Cir. 1986) (court refuses to abstain under *Younger* in part because the federal plaintiffs had been state plaintiffs below).

Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975) (quoting *Younger*, 401 U.S. at 44). Although originally applied to pending state criminal prosecutions, "[t]he policies underlying *Younger* are fully applicable to non-criminal judicial proceedings when important state interests are involved." *Middlesex*, 457 U.S. at 432. As the Supreme Court has recently emphasized, abstaining from a pending administrative proceeding against a school, "it is perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending state proceedings in state courts is not to issue such injunctions." *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718, 2723 (1986) (quoting *Younger*, 401 U.S. at 45). *Younger* abstention can be applied to "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings, the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Ohio Civil Rights Commission*, 106 S. Ct. at 2723. We thus must answer three relevant questions: (1) whether the state proceedings "constitute an ongoing state judicial proceeding;" (2) whether the proceedings "implicate important state interests;" and (3) whether there is "an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex*, 457 U.S. at 432.

Turning our attention to these inquiries, we find that the administrative proceeding before the Council constitutes an ongoing judicial proceeding under *Middlesex* and *Ohio Civil Rights Commission*, as it is appealable to the Civil District Court for the Parish of Orleans, and is thus "within the appellate jurisdiction" of the Louisiana courts. *Ohio Civil Rights Commission*, 106 S. Ct. at 2723. The interest of the Council of New Orleans in setting retail

rates is clearly important here: indeed, jurisdiction over retail rates is preserved to the states by the terms of the Federal Power Act. Finally, we find that through the appellate process, NOPSI would have a full and fair opportunity to litigate its federal claims. As in *Ohio Civil Rights Commission*, NOPSI cites no authority indicating that state review cannot be had of its claims. 106 S. Ct. at 2724. As there is no "bad faith, harrassment [sic] or other exceptional circumstances" which dictate to the contrary, the district court's decision to abstain could be grounded on *Younger*.[3]

For the above reasons, we conclude that the district court's decision to abstain on the instant facts was a proper exercise of discretion. Given the above, our initial opinion reversing the district court is withdrawn in part, and the order of the district court dismissing NOPSI's claim is AFFIRMED. The mandate shall issue forthwith.

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[3] In addition, the Council at the time NOPSI sought injunctive relief from the district court had not yet taken any definitive action on NOPSI's May 17, 1985 rate increase application. Concerns of federalism lead us to treat challenges to anticipated state agency action "with special skepticism." Wright and Miller § 3532.6. In *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 244 (1952), the Supreme Court refused to address the merits of a claim it described as seeking a declaratory judgment for the purpose of "*guard[ing] against the possibility* that [the local commission] would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission" (emphasis in original). The Court observed:

> as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or has no purpose at all.

Id. at 247.

APPENDIX C

TITLE: NOPSI -vs- CITY OF NEW ORLEANS, ET AL.,
No. 85-3654

1. RECORD, EXHIBITS AND BRIEF INFORMATION

Reporter's Ack. due _____
Transcript due * **ON FILE**

Partial Record or Cert. List
OCT 31, 1985 Record on Appeal *10/28 R.M.
No. of Vols. *5
_____Supp. Record No. of Vols._____
_____Second Supp. Record No. of Vols._____
_____ Third Supp. Record No of Vols._____
OCT 31 1985 Exhibits *2 Env. *1 Box. ☐Pkg. ☐Roll
_____Exhibits ☐Env. ☐Box ☐Pkg.
☐Roll
_____Appendix ☐(P) ☐(M)
NOV 14 1985 Record Excerpts
_____Supp. Certified List
_____Briefing Notice Issd. *10/31
NOV 14 1985 Brief for Appellant _____
_____Brief for Appellant _____
_____Brief for Appellant _____
_____Brief for Appellant _____
12/16/85 Brief for Appellee *(J)_____
_____Brief for Appellee _____
_____Brief for Appellee _____
_____Brief for Cr. Appellee _____
*12-23-85 Reply Brief for Appellant *(J)_____
_____ Reply Brief for Appellant _____
12/20/85 Amicus-St. of La. *(J)_____

* **Handwritten Material.**

APPENDIX C

_____Supp. Brief for Appellee _____

11-25-85 Brief for Amicus ***FERC-(RT) 11-29-85 (RT)(J)**

_____Intervenor _____

_____Rule 28(j) letter-Appellant _____

_____Rule 28 (j) letter-Appellee _____

NOV 26 1985 ***Brief for Amicus (Middle South Energy)**

12/20/85 ***Amicus-Ms. Pub. Ser. (J)**

12/23/85 ***Amicus-Nat'l Assoc. State(J)**

***10-31-85** ***1 Box of Exhs.-Extra Copies**

Miscellaneous Filings | Filing:

***10-22-85** Dup. Notice of Appeal and Clerk's Statement of Docket Entries

_____Papers Trans. from Misc No. _____

_____Order of DC Granting appeal IFP

_____Order of DC Appointing Counsel

_____Affidavit of Financial Status

_____CJA 20 Issd. /Voucher Recd. _____

AGENCY REVIEW CASES | Filing:

_____Petition for Review of Order ( ) of
☐NLRB ☐FERC ☐ICC ☐

_____Application for Enforcement-NLRB

_____Answer to Application for Enforcement

_____ Cross Application for Enforcement

*** Handwritten Material.**

4. EXTENSION FLG. Motion for:	Order Fld.	Ext. to:
_____Transcript _____		
_____Transcript _____		
_____Transcript _____		
_____Appellant's Brief _____		
_____Appellant's Brief _____		
_____Appellant's Brief _____		
_____ _____		
_____Appellee's Brief _____		
_____Appellee's Brief _____		
_____Appellee's Brief _____		
_____ _____		
_____Reply Brief _____		
_____ _____		
_____ _____		
_____ _____		

5. CALENDAR INFORMATION

Special Panel _____

Summary Panel: _____

*11-29-86 Case Assigned for *1-9-86 in

☐EB *☑W ☐E ☐_____

_____Case Cont'd for Reassignment _____

_____Case Reassigned for _____ in

☐EB ☐W ☐E ☐ _____

Hearing Panel: *CDR-JSW-Himtsa (sic)

*1-9-86 Case Argued *☐by Appellant *☑by Appellee ____

_____Case Sub. w/o Arg. ☐by Appellant

☐by Appellee

_____

* Handwritten Material.

6. OPINION INFORMATION *P☑ NP☐

2/14/86 Opinion Rendered

☐ Affirmed ☐ _____

CDR Reversed _____

☐ Affd. in Pt. ☐PC ☐Conc. Spec.

☐ Vacated [XX] Signed ☐Dis.

☐ Dismissed ☐Rule 47.6 Dis. in Pt.

_____Opinion Withdrawn _____

*Issued in T. form ;p3654

7. REHEARING INFORMATION

_____Mot. for Ext.-Ext. to: _____

_____Mot. for Ext.-Ext. to: _____

_____Petition for Rehearing _____

☐Appellant ☐Appellee ☐Reg. ☐En Banc

_____Petition for Rehearing _____

☐Appellant ☐Appellee ☐Reg. ☐En Banc

_____Response of _____

_____Order Denying Rehearing

☐ Dissenting

_____ ☐ Opinion S9

_____ ☐ Order on Petition for Rehearing S9

* Handwritten Material

85-3654

8. MOTIONS

Filing Motion to or for:

_____Mandamus

_____Reinstate Appeal

_____Stay Further Proceedings in CA

_____Stay Pending Appeal

_____Injunction Pending Appeal

_____Consolidate Appeals W/

_____Leave to Appeal IFP

_____Bail Pending Appeal

_____Withdraws as council

_____Appointment of Counsel

_____Supplement Record

_____Expedite

*12-12-85 File Brief in Excess *Sub AT Pgs.

*appellee-(75)

*GRANTED by AT 12-13-85

_____File Brief in Excess Pgs.

_____Dismiss by Appellant

_____Dismiss by Appellee

*11-14-85 Amicus Curiae *Middle South

(Brief attached)

*11-25-85 GRANTED By ABR 11/25/85

Response Filed City of N.O.

_____File Supp. Brief

_____Stay of Mandate

_____Recall of Mandate

_____Intervene

_____Intervene

_____File Reply Br. out of time *sub ABR 11-21

*11-14-85 * Expedite (appellant) Response Filed by City of

N.O. 11/21/85

*Sub ABR 11-22DATE:

*See: DEC. 9 11-25-85

* Handwritten Material

9. DOCKET ENTRIES Sub ABR 11-21-85

11/18/85 Flg. ltr. dtd. 11/18/85 from cnsl. for City of N.O. advising that they will file a response to motion to expedite.

11/20/85 Flg. ltr. dtd 11/18/85 from FERC advising they intend to file a brief as amicus by Friday, 11/22/85. Sub. ABR 11-21-85

11/22/85 Minute Entry: Judge Rubin ask that I phone cnsl. Andrew Carter and have him set up a conference call w/cnsl. for City of New Orleans after 2:30 p.m. today. (Joan Perkins)

11/25/85 Flg. Motion of FERC for leave to file brief in xerox, preliminary typewritten form. (GRANTED-jp-11/25/85)

11/25/85 Flg. order GRANTING appellant's motion to expedite appeal, but DENYING motion to set oral arg. for 12/2/85. The dist. ct.'s opinion was rendered 9/18/85 and motion was not fld. until 11/14, so the appellants have taken 54 days to file motion and briefs and the motion would allow the appellees less than 10 days within which to respond. The case is, however, set for oral arg. on the 9th day of January, 1986. Appellee's brief must be fld. by 12/16/85 at 5:00

10. JUDGMENT OR MANDATE INFORMATION

***2-28-86 Bill of Costs -*NOPSI**

_____Flg. & Entg. Judgment

_____Issg. Copy of Jdgt. to Bd & Cnsl.

_____Jdgt. as Mdt. Issd. to Clerk ***Hold Mandate**

_____Jdgt. as Mdt. Reissd. to Clerk ***Per J. Jones 3/4/86.**

_____Dismissal Issd. to Clerk_____

_____Record on Appeal Retd. to Clerk *** (Checked w/ J. *Jones on 3-29 Continue to hold) *Continue to hold Per.C.D.R.**

_____**Exhibits Retd. to Clerk**

_____ _____

_____ _____

*** Handwritten Material**

11. SUPREME COURT INFORMATION

_____Notice of Appeal to S.C.
_____Preparing Proceedings on Certiorari
_____Preparing Supp. Proceeding on Cert.
_____Transmitting Orig. Exhibits to S.C.
_____Order of S.C.—Ext. to_____
_____Notice of Fig. of Cert. Pet on_____
_____Order of S.C. ☐Denied ☐Granted_____
_____Notice of Denial of Pet. for Rehearing
_____Opinion of S.C. dated_____
_____Judgment of S.C.

85-3654

DATE	Filings-Proceedings
cont'd	
11/25/85	and hand delivered to one of opposing cnsl in N.O. by that time. Reply brief, if any, must be filed by 12/23/85, at 5:p.m., and hand delivered to one opposing cnsl. in N.O. by that time. (ABR)
12/6/85	Flg. motion of FERC for leave to participate in oral argument.* **Sub. AT 12/6/85**
12/9/85	Flg. response of NOPSI in support of FERC motion for leave to participate in oral arg. and further suggesting to the Court that it may wish to consider enlarging time to 30 minutes per side. * **-12-10 Hand carried to Judge Tate (illegible) to panel**
12/12/85	Minute entry: The Court, without issuing a formal order, GRANTED FERC's request to participate in oral arg. Also, the Court has increased the oral arg. time to 30 minutes per side. (AT) FERC's time will be deducted from allotted time of appellant.
12/16/85	Flg. Arkansas Public Service Comm's notice of intent to file a brief as amicus in support of appellees' position * **Sub. AT 12-17**
12/16/85	Flg. Miss. Public Service Comm. and Edwin Lloyd Pittman, Atty. Gen. for State of Miss.'s notice of intent to file amicus brief. * **Sub AT 12-17**
12/20/85	Flg. Motion of National Assoc. of State utility Consumer Advocates for leave to file amicus brief. (Brief attached). ***Sub. AT 12-23-85**
12/23/85	Flg. Arkansas's withdrawal of notice of intent to file a brief as amicus. (J)
12/23/85	Flg. order GRANTING motion of National Assoc. of State Utility for leave to file amicus brief in support of appellees. (AT)

* **Handwritten Material.**

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3654

NEW ORLEANS PUBLIC SERVICE, INC.,
Plaintiff-Appellant,

versus

THE CITY OF NEW ORLEANS,
THE COUNCIL FOR THE CITY OF
NEW ORLEANS, SIDNEY J. BARTHELEMY,
ET AL.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

O R D E R:

IT IS ORDERED that the motion of Federal Energy Regulatory Commission for leave to intervene to enable it to seek rehearing en banc is DENIED.

IT IS FURTHER ORDERED that the Commission's request to extend the time up to and including October 16, 1986, within which to file a rehearing en banc, if allowed to intervene, is DENIED.

The mandate has already issued. The Federal Energy Regulatory Commission has had ample notice of these proceedings, including the fact that the Court was considering the action taken on September 2, 1986; has participated as amicus throughout these proceedings; and has filed briefs on the issues presented by the Court's action of September 2 which were considered by the Court.

/s/ CAROLYN DINEEN RANDALL

UNITED STATES CIRCUIT JUDGE

APPENDIX E

MINUTE ENTRY
McNAMARA, J.
September 16, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS PUBLIC SERVICE, INC.	*	CIVIL ACTION
VERSUS	*	No.85-3398
THE CITY OF NEW ORLEANS, ET AL	*	SECTION "D" (2)

Before this court is the Motion of Defendants, the City of New Orleans ("City") and the Council of the City of New Orleans ("Council"), to Dismiss the complaint filed by New Orleans Public Service, Inc. ("NOPSI") pursuant to Fed. R. Civ. Proc. 12 (b)(1) and 12(b)(6). The Motion for Dismissal is predicated on the following grounds: (1) this court lacks subject matter jurisdiction (Fed. R. Civ. Proc. 12(b)(1)), because of the Johnson Act, 28 U.S.C. § 1342; (2) pursuant to the doctrines of Ripeness, Exhaustion of Administrative Remedies and Abstention, this court lacks jurisdiction or should refrain from exercising its jurisdiction; (3) the Council is immune from suit; and (4) Plaintiff fails to state a claim upon which relief can be granted.

At the outset, it is important to note that as Defendants have made a "factual attack" upon this court's subject matter jurisdiction, the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Evans v. Tubbe,* 657 F.2d 661, 663 (5th Cir. 1981). Moreover, it is incumbent upon Plaintiff to prove that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir.), *cert. denied,* 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980).

After consideration of the legal memoranda submitted by counsel, the applicable law, and the evidence proffered by the parties, the court finds that jurisdiction is precluded by the Johnson Act, 28 U.S. § 1342, and that the jurisprudential doctrine of abstention militates against judical review of those issues over which this court has or may have jurisdiction. It is therefore the finding of this court that this action be dismissed, for the reasons set forth below.

FACTUAL BACKGROUND

Pursuant to a permit granted by the City in 1922, Ordinance No. 7068 C.C.S., NOPSI provides electric service throughout the City (except Algiers). NOPSI also engages in the production, wholesale interstate purchase, wholesale interstate sale and retail sale of electric power. NOPSI, along with several other subsidiaries[1] owned by Middle South Utilities, Inc. ("MSU"), has entered into a series of power pool agreements ("System Agreement"). This System Agreement is a wholesale rate schedule, subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").[2] The System Operating Companies' agreement was submitted to FERC, and became effective on January 1, 1983. In June of 1982, a Unit Power Sales Agreement ("UPSA") was filed with FERC by Middle South Energy, INC. ("MSE"). MSE, also

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[1] The other subsidiaries are: Arkansas Power and Light Company ("AP&L"), Louisiana Power and Light Company ("LP&L"), and Mississippi Power and Light Company ("MP&L"). These utilities are the "System Operating Companies."

[2] FERC has authority to regulate the "sale of electric energy at wholesale in interstate commerce . . ." pursuant to §201(b) of the Federal Power Act, 16 U.S.C. § 824(b).

a wholly owned subsidiary of MSU, is the principal owner of the Grand Gulf nuclear generating facility near Port Gibson, Mississippi ("Grand Gulf"). Pursuant to UPSA, NOPSI is obligated to purchase a specific percentage of Grand Gulf power from MSE.

FERC issued an "Opinion and Order Setting Just, Reasonable, and Non-Discriminatory Rates ("Opinion No. 234") for Grand Gulf I on June 13, 1985. In accordance with FERC Opinion No. 234, NOPSI's allocation of costs, capacity and energy from Grand Gulf I is 17 percent. Accordingly, when Grand Gulf I began commercial operations on July 1, 1985, NOPSI was obligated to purchase 17 percent of Grand Gulf I power from MSE.

On May 17, 1985, NOPSI filed an application for a permanent rate increase in its retail electric rates with the Council seeking to allay costs associated with Grand Gulf and non-Grand Gulf related matters. On July 25, 1985, the Council entered a resolution directing NOPSI to resubmit its application for permanent rate relief since NOPSI had failed to comply with the filing requirements of the Council. The July 25th resolution also directed NOPSI to file a request for emergency interim rate relief. The Council subsequently issued Resolution R-85-526, specifically addressing NOPSI's request for emergency interim rate relief.

The action presently before the court was filed by NOPSI on August 2, 1985. In its complaint, NOPSI seeks declaratory and injunctive relief, as well as money damages against the City and the Council in reference to the Council's refusal to grant NOPSI the rate increase it has requested.

At a hearing on August 12, 1985, this court considered NOPSI's Motion for a preliminary injunction. The injunctive order would have compelled the Council to allow NOPSI to "pass through" its increase in interstate wholesale rates (arising from costs associated with Grand Gulf) onto its customers by increasing its intrastate retail rates. This court denied NOPSI's Motion without prejudice, and directed that the Council take action by September 5, 1985 on NOPSI's request for emergency interim rate relief which was to be filed by NOPSI on August 19, 1985 and to be considered at a public hearing scheduled for August 22, 1985. The court further noted that there were unresolved jurisdictional issues in this case that might foreclose adjudication on the merits. The resolution of these issues was deferred, pending Council action on NOPSI's request for interim rate relief.

On September 5, 1985, after public hearings, the Council issued a resolution, R-85-526, which granted in part NOPSI's August 19, 1985 request for emergency interim rate relief. In its resolution, the Council noted that NOPSI's *interim* rate increase proposal was devoid of any phase-in provision that would moderate the severe rate shock effect of the proposed substantial rate increase on its ratepayers. Accordingly, the Council emphasized that its emergency interim rate order would be based on an equitable balancing of the interests of NOPSI, its stockholders, and the ratepayers. The resolution ordered NOPSI to freeze electric rates until further regulatory action. This freeze would provide the utility with substantial fuel cost savings because of the lower fuel costs of Grand Gulf I compared to NOPSI's existing gas-fired generation. The Council further noted that NOPSI's immediate cash flow problems could be at least temporarily alleviated by

the following: the utility's issuance of $35 million dollars [sic] in securities pending the Securities and Exchange Commission's ("SEC") approval[3]; the repayment of $32 million dollars [sic] in cash advance made by NOPSI to MSE; and, the continued omission of NOPSI's dividend payments on common stock to MSU. Based on cash flow projections using these measures, the Council found that these measures would enable NOPSI to remain solvent until March 1986. See, R-85-526, pgs. 9 and 13.

Subsequent to the issuance of the resolution, NOPSI submitted formal requests for a clarification of the rate order. However, the Council construed such requests as seeking for more than clarification, as NOPSI's requests would substantively change the rate order. The Council proposed a public hearing to consider revising the rate order. NOPSI, however, has foregone that option and seeks injunctive relief from this court once again.

As noted earlier, at the hearing on August 12, 1985, this court expressed reservations about the "serious jurisdictional issues" inherent in this litigation. The court must now consider and resolve the following issues: (1) does the Johnson Act, 28 U.S.C. § 1342, preclude jurisdiction over the subject matter in the instant case, and (2) does the jurisprudential doctrine of abstention dictate that this court decline to exercise jurisdiction?

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[3] The Council noted that if the SEC denies NOPSI's application for the issuance of the securities, the utility should resubmit an application for emergency interim rate relief and this application would be considered on an expedited basis.

THE JOHNSON ACT

The Johnson Act, 28 U.S.C. §1342, provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

A cursory reading of the statute reveals that all four conditions must exist in order for the proscription to apply. *South Central Bell Telephone Co. v. Louisiana Public Service Comission*, 744 F.2d 1107, 1123, n. 28 (5th Cir. 1984).

The thrust of the Johnson Act ("Act") is to effect "a congressional hands-off policy relating to rate making . . ." *Tennyson v. Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974). While the provisions of the Act do not address declaratory relief or money damages, courts have found

that strong policy reasons dictate a broad reading of the Act so as to bring declaratory relief and money damages within the purview of the jurisdictional proscription. *See, Tennyson, supra,* at 1139. One strong policy reason dictating a broad reading is the "general rule [that] federal courts should not intervene in the state rate-making process unless the remedy in state court is inadequate." *Gulf Water Benefaction Co. v. Public Utility Commission,* 674 F.2d 462, 467 (5th Cir. 1982) (citing *Tennyson, supra,* at 1141). The Fifth Circuit has emphasized that "[t]he clear intent of this Act is to channel normal rate litigation into the state courts . . ." *Gulf, supra,* at 468.

With the foregoing principles in mind, this court must inquire as to whether all four criteria have been met so as to implicate the proscription of the Act.

In its supplemental brief on the inapplicability of the Act, NOPSI stated that "[t]wo of the Johnson Act conditions do not exist . . ." The two conditions cited were: (1) jurisdiction is *not* based solely on repugnance of the order to the Federal Constitution, and (2) the order *interferes* with interstate commerce. It is important to note that NOPSI *does not* contest the existence of the following two conditions: (1) the order was made after reasonable notice and hearing, and (2) a plain, speedy and efficient remedy may be had in state court. Accordingly, the court need only inquire as to whether the first two conditions of the Act have been met.

In reference to the Act's requirement that jurisdiction be based solely on diversity of citizenship or repugnance of the order to the Constitution, NOPSI contends that it cannot be met as the present action is based

in large part upon the Federal Doctrine of Preemption and 16 U.S.C. §825p of the Federal Power Act. 16 U.S.C. § 825p provides federal courts with jurisdiction to entertain actions "brought to enforce any liability or duty created by, or to enjoin any violation of" a FERC order. It is NOPSI's contention that the Council has violated a "duty" imposed upon it by FERC Opinion No. 234 and the Federal Power Act. The Defendants' contention is that while NOPSI has purportedly based part of its action on the Federal Power Act, the Council has, in fact, violated no provision of that Act. As noted, the Federal Power Act, 16 U.S.C. § 825p, provides federal courts with jurisdiction to entertain actions "brought to enforce any liability or duty created by, or to enjoin any violation of" a FERC order. NOPSI asserts that FERC Opinion No. 234 creates a *duty* on the part of the Council to "pass through" the costs NOPSI incurs as a result of its 17 percent FERC allocation to its retail ratepayers and, that the Council's failure to allow recovery of those expenses constitutes a violation of the FERC order. The court finds that a review of FERC Opinion No. 234 belies NOPSI's contentions, for the FERC order merely prescribes interstate wholesale rates that NOPSI is obligated to pay in exchange for its share of Grand Gulf power. More importantly, there is no mandate in the FERC order for state regulatory authorities to pass

through the expenses associated with NOPSI's interstate wholesale rates via an increase in intrastate rates. Indeed, such a provision is conspicuous by its absence.

Additionally, the court finds that the Council has not taken any definitive action on NOPSI's May 17, 1985 permanent rate increase application. In the September 5th resolution the Council states that its emergency interim rate order is without prejudice to NOPSI's application for a permanent rate increase, filed on May 17, 1985.

A review of the Council's actions and the FERC order at issue convinces the court that jurisdiction under the Federal Power Act is lacking for the Council has not breached any duty imposed by the FERC order nor have they violated any provision of that order.

NOPSI also asserted claims predicated on 28 U.S.C. § 1983, invoking this court's jurisdiction pursuant to 28 U.S.C. § 1343. The courts have been uniform in holding that the Civil Rights Statutes do not provide an avenue for circumventing the restrictions of the Johnson Act. *Kalinsky v. Long Island Lighting Company,* 484 F.Supp. 176 (E.D. N.Y. 1980). Similarly, NOPSI's jurisdictional invocation of the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, does not provide for an independent basis of jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed.2d 876 (1950). Having considered the alleged jurisdictional bases asserted in NOPSI's complaint, the court finds that jurisdiction is based solely on repugnance of the Council's actions to the United States Constitution. Accordingly, the first condition of the Johnson Act has been met.

The second condition which must exist under the Act is that the rate order must not interfere with interstate commerce. In determining whether this condition exists, the courts inquire as to whether the rate order is "directly burdensome or otherwise discriminatory" of interstate traffic. *Kalinsky, supra,* at 176. The general rule is that "a rate issued by a proper state body does not interfere with interstate commerce [within the meaning of 28 U.S.C. § 1342(2)] unless it is directly burdensome or otherwise discriminatory." *Kalinsky, supra* (citations omitted). In *South Central Bell Telephone Co. v. Public Service Commission of Kentucky,* 420 F.Supp. 376, 378 (E.D. Ky. 1976), the court conceded that the phrase "interfere with interstate commerce" was nebulous. However, in construing the phrase, the court noted that the Act manifests congressional intent that state utility rates are matters for state regulations [sic]. Accordingly, the court found that state agency orders pertaining to intrastate telephone rates did not interfere with interstate commerce within the meaning of the Johnson Act. 420 F.Supp. at 378.

NOPSI contends that the Council's decision against an intrastate rate increase constitutes an impermissible burden on interstate commerce, as the utility will be rendered insolvent and the FERC order setting forth the allocation of Grand Gulf costs will ultimately be frustrated. More specifically, NOPSI aserts that the Council's refusal to implement rates taking into account the expenses associated with Grand Gulf will disrupt financial agreements among the members of MSU, threaten the operation of Grand Gulf I, and threaten the viability of an interstate intergrated electric system.

The Defendants emphasize the fact that the Council has not yet issued any order granting or denying NOPSI's

request for a permanent rate increase. Moreover, Defendants contend that any injunctive order issued at this point in time would be intrusive upon the Council's regulatory authority, for the Court would then be dictating the terms of an order which has yet to be formalized. A review of the evidence adduced supports the Defendants' contentions. As noted earlier, the Council's September 5th resolution was cognizant of the fact that no decision had been formalized in reference to NOPSI's request for permanent rate relief. More importantly, the September 5th resolution indicates that the Council is utilizing every feasible alternative to keep NOPSI in a positive cash position. NOPSI has argued that *Middle South Energy Inc. v. Arkansas Public Service Commission,* Nos. 84-2409, 2410 and 2480 (8th Cir. August 23, 1985) is apposite for resolving the issue of whether the Council's actions create an "interference on interstate commerce;" this court cannot agree. In *Middle South Energy,* the court was confronted with blatant attempts by the Arkansas Public Service Commission (APSC) to invalidate agreements relating to Grand Gulf. The APSC had ordered Arkansas Power and Light to appear and "show cause why all contracts and agreements made by it with respect to . . . the Grand Gulf project should not be held void *ab initio* as a matter of law." Slip op. at 7. NOPSI asserts that just as the Eighth Circuit found the APSC's attempted action had a discriminatory purpose and effect, this court must necessarily find that the Council's conduct is discriminatory in purpose and effect.

NOPSI concedes that the Council has not *directly* attempted to invalidate FERC Opinion No. 234, as did APSC in *Middle South Energy, supra.* Nonetheless, it claims that the Council's denial of sufficient emergency interim rate

increase manifests an attempt on the part of the Defendants to do indirectly that which they may not do directly. While NOPSI insists that its insolvency is imminent due to the Council's refusal to grant sufficient emergency interim rate relief, it bears repeating that the Council has not addressed the issue of NOPSI's request for a permanent rate increase. Moreover, the September 5th resolution reveals that the Council is determined to assist NOPSI in maintaining a positive cash position by pursuing a number of feasible alternatives.

At this juncture, the court cannot and will not assume that when the Council does act on the issue of permanent rate relief, it will do so in a manner which conflicts with the FERC's order. Moreover, any rate orders or regulatory actions which *may* indirectly and incidentally affect interstate commerce, cannot suffice as an "interference" within the Johnson Act. *Kansas-Nebraska Natural Gas Co., Inc. v. City of St. Edward, Nebraska*, 234 F.2d 436 (8th Cir. 1956). Having sifted through the evidence, this court concludes that the Council's actions do not constitute an interference with interstate commerce. As all four criteria of the Johnson Act have been satisfied, this court is effectively precluded from issuing any injunctive, declaratory or monetary relief relative to the ratemaking functions and orders of the Council.

ABSTENTION AND OTHER CONSIDERATIONS OF COMITY

Even if this court were to find that the Johnson Act did not bar adjudication of Plaintiff's request for relief from the Council's regulatory authority, the jurisprudential doctrine of abstention and other considerations of

comity would dictate a similar result. Abstention embodies the well-established principle that under the rule of comity in cases dealing with state laws, rules or policy decisions, equitable considerations will require a federal court to stay its hand. *General Investment v. Service Corp. v. Wichita Water Co.,* 236 F.2d 464, 468 (10th Cir. 1956). Quite frequently, abstention is compelled on the grounds of comity with the states when the exercise of federal court jurisdiction would disrupt a state administrative process or conflict with a state's administration of its own affairs. *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

The hands-off policy in reference to state ratemaking, congressionally mandated in the Johnson Act, is evinced and manifest in *Burford* where the United States Supreme Court cautioned federal courts to keep a hands-off policy in state regulation of the oil industry.

In *Burford,* the court held that abstention was proper in a challenge to a Texas state commission's oil field proration order. The court emphasized that as there were "questions of regulation of the industry by the state administrative agency. . . [involving] basic problems of Texas policy . . . equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." 319 U.S. at 332-34, 63 S.Ct. at 1106-07. Moreover, the court noted that the state provided a unified method for the formation of policy and determination of cases by the commission and by the state courts.

Burford is a paradigm for abstention in the instant case. Without question, "the power to regulate intrastate services such as utilities has historically been reserved to

the states by Congress pursuant to the provisions of the Tenth Amendment of the United States Constitution." *Gulf Water Benefaction Co. v. Public Utility Commission*, 674 F.2d 462, 467 (5th Cir. 1982) (citations omitted). Undoubtedly, NOPSI's "pass through" proposal and its proposal for a permanent rate increase are matters which generate local concern and demand local administrative expertise. The court finds that the present case calls for *Burford* abstention as it is set in the context of "the quintessential *Burford* setting of a complex . . . regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review[4] are afforded. The usual rule of comity must govern . . ." *Aluminum Company of America v. Utilities Commission of State of North Carolina*, 713 F.2d 1024, 1029, *cert. denied*, ___ U.S. ___, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984).

NOPSI contends that abstention is inappropriate where the claim presented is based on federal preemption. NOPSI points out that in *South Central Bell Telephone Co., supra*, the Fifth Circuit rejected the application of *Burford* abstention in the context of a rate case based on a federal preemption claim. However, in *South Central*, the Federal Communications Commission ("FCC") had issued a Preemption Order *specifically* declaring that its depreciation rates and methodologies preempted inconsistent state law. Moreover, the FCC had issued a ruling prescribing the

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[4] Section 4-1604 of the 1954 Home Rule Charter, which governs the establishment of utility rates by the City Council, provides in part:

> Any party in interest may appeal from orders of the council to the Civil District Court for the Parish of Orleans by filing suit against the Council within thirty (30) days from the date of the order of the Council, and not thereafter.

specific rates to be used in calculating depreciation. The Louisiana Public Service Commission refused to implement the FCC's prescribed depreciation methods when South Central Bell requested a rate increase. 744 F.2d at 1112-1112 [sic]. The Fifth Circuit noted that South Central Bell's claim for a preliminary injunction was based on "a naked exercise of the federal preemption power." 744 F.2d at 1123. (citations omitted).

South Central Bell however bears no resemblance to the facts involved here. The case at bar is analogous to *Aluminum, supra,* where the Fourth Circuit noted that there is no *per se* rule against abstention in preemption cases; rather, the court must look at the facts of each case. In *Aluminum,* the Fourth Circuit found that the rate "order on its face set only retail, intrastate rates, an important matter traditionally within the sole discretion of the states, and [did] not directly conflict with FERC's wholesale and interstate rate setting powers." *Aluminum, supra,* at 1030. The court concluded that "[w]here circumstances are otherwise appropriate for *Burford* abstention, the federal court need not engage in [detailed] fact finding [concerning the indirect effects of the rate order on the rates and contracts filed with FERC] as a prerequisite to abstention." *Id.* In the instant case, the actions of the Council address only retail, intrastate rates, and such actions have not directly conflicted with FERC's order. As circumstances are otherwise appropriate for *Burford* abstention, this court need not engage in detailed fact finding concerning the preemption claim as a prerequisite to abstention.

In reference to Plaintiff's 28 U.S.C. § 1983 action against Defendants alleging a deprivation of civil rights,

there is no *per se* civil rights exception to the abstention doctrine. *C-Y Development Co. v. City of Redlands,* 703 F.2d 375, 381 (9th Cir. 1983). Accordingly, as this court is "concerned with the much larger [policy] issue as to the appropriate relationship between federal and (municipal regulatory) authorities . . . ", considerations of delay, and inconvenience to the parties do not and cannot militate against abstention in this § 1983 action. 703 F.2d at 381.

Accordingly, the court finds that the Motion of the Defendants to Dismiss Plaintiff's action should be and is hereby GRANTED for lack of subject matter jurisdiction. As to those issues of which this court might take jurisdiction, principles of comity, require it to abstain.

* * * *